

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9297

IN THE MATTER OF

SCHERING-PLOUGH CORPORATION,

UPSHER-SMITH LABORATORIES, INC.,

and

AMERICAN HOME PRODUCTS CORPORATION

**MOTION OF NATIONAL ASSOCIATION OF
CHAIN DRUG STORES FOR LEAVE TO
FILE BRIEF AS *AMICUS CURIAE***

[PUBLIC]

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Dated: August 26, 2002

Pursuant to 16 C.F.R. § 3.52(j) National Association of Chain Drug Stores

(“NACDS”) respectfully moves for leave to file a brief *amicus curiae* in this matter. NACDS is a tax-exempt association of nearly 200 chain community pharmacies that operate over 34,000 pharmacies throughout the United States. Anticompetitive practices by drug manufacturers, such as those at issue in this appeal, harm NACDS members and their customers by maintaining artificially high prices for prescription drugs. NACDS believes that its industry-wide perspective on this important case will be of assistance to the Commission and, accordingly, NACDS moves for leave to file an *amicus curiae* brief in support of Appellant.

In particular, the proposed *amicus curiae* brief addresses the question whether it is *per se* unlawful for a patent holder to pay the alleged infringer to stay out of the market for a defined period of time. Two federal district courts and numerous commentators have concluded that such agreements are *per se* unlawful. The Initial Decision nevertheless refused to apply the *per se* rule to the agreements here. The proposed *amicus curiae* brief demonstrates in detail that the Initial Decision was based upon a misunderstanding of the nature of both the *per se* rule and the patent rights granted by Congress to innovators. We respectfully suggest that the brief may be of assistance to the Commission in addressing this issue that is of importance not only in this litigation but in similar cases pending throughout the country.

Good cause exists for the filing of the brief at this time because a public version of Appellant's brief was not filed until August 9, 2002. The *amicus curiae* brief was prepared as expeditiously as possible thereafter. The time remaining for Appellees to file their reply briefs is sufficient for them to respond to the arguments raised by the *amicus curiae* brief.

WHEREFORE, NACDS respectfully requests that the Commission grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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